

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
ROOM 211  
FEDERAL BUILDING AND U.S. POST OFFICE  
225 SOUTH PIERRE STREET  
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT  
BANKRUPTCY JUDGE

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March 5, 2004

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William J. Pfeiffer,  
Chapter 7 Trustee  
Post Office Box 1585  
Aberdeen, South Dakota 57402

Subject: *In re Larson Concrete Company,*  
Chapter 7; Bankr. No. 00-10053

Dear Counsel and Trustee:

The matter before the Court is the motion to allow an administrative expense claim for Steven G. Larson filed by Debtor, the objection thereto filed by Trustee William J. Pfeiffer, and the joinders in the objection filed by B & B Concrete and J & D Enterprises. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below, Steven J. Larson's administrative expense claim will be denied.

SUMMARY. By check dated March 21, 2000, Steven Larson gave Curt R. Ewinger \$10,000. There was no notation on the check of its purpose.

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Larson Concrete Company ("Debtor") filed a Chapter 11 petition in bankruptcy on March 22, 2000. Debtor's application to employ Curt Ewinger<sup>1</sup> as its bankruptcy attorney was approved by order entered March 28, 2000.<sup>2</sup>

On March 24, 2000, a deposit slip was prepared to place the \$10,000 from Steven Larson into Attorney Ewinger's law firm's trust account. The bank where the trust account is held received the deposit on March 27, 2000.

In its schedules, Debtor listed Steven Larson as holding an unsecured claim for \$80,000. In its Statement of Financial Affairs, Debtor stated it had not made any payments to attorneys for debt counseling or bankruptcy within one year before the petition.

While the case was under Chapter 11, a plan was never confirmed. Further, Debtor did not seek nor was it ever granted

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<sup>1</sup> Debtor's application to employ Attorney Ewinger and Attorney Ewinger's attendant affidavit failed to disclose that the funds used to retain Attorney Ewinger had come from Steven Larson, Debtor's president and sole shareholder. See Fed.R.Bankr.P. 2014(a)(an application to employ an estate professional shall state "any proposed arrangement for compensation, and ... [any] connections with ... any other party in interest[.]"); see *Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881-82 (9th Cir. 1995)(Chapter 11 debtor's counsel should have disclosed that his retainer was paid by the debtor's president with funds the president had borrowed earlier from the debtor corporation); *In re Missouri Mining, Inc.*, 186 B.R. 946, 947-50 (Bankr. W.D. Mo. 1995)(court must consider each case individually when looking for possible conflicts when the debtor's attorney is paid by a third party).

<sup>2</sup> Attorney Ewinger did not file a disclosure of compensation as required by 11 U.S.C. § 329(a) and Fed.R.Bankr.P. 2016(b). See generally *Schroeder v. Rouse (In re Redding)*, 263 B.R. 874, 878-80 (B.A.P. 8th Cir. 2001)(discussion of § 329(a) and possible consequences of a failure to disclose).

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authority to incur a debt outside the normal course of business. Debtor's case converted from Chapter 11 to Chapter 7 on May 1, 2001.

On November 14, 2001, Steven Larson filed a proof of claim. He said he was owed \$80,000 as an unsecured claim and \$10,000 as a priority claim for a total of \$90,000. On the proof of claim form, Steven Larson indicated the \$10,000 priority claim arose under § 507. There is an "(I)" handwritten behind the § 507 declaration on Steven Larson's proof of claim, although § 507 does not include a subsection (I).

On July 8, 2003, Trustee Pfeiffer objected to Steven Larson's proof of claim. He argued Larson had not demonstrated that he was entitled to any funds, priority or otherwise. A hearing on the objection to the proof of claim was held August 19, 2003. At the hearing, Attorney Ewinger stated that \$10,000 of Steven Larson's proof of claim was actually for an administrative expense claim. The Court thus directed that an administrative expense motion be filed and noticed for objection. By agreed order entered February 2, 2004, parties in interest settled Steven Larson's unsecured claim for \$25,000.

On September 18, 2003, Debtor filed a motion asking that Steven J. Larson be allowed an administrative expense claim.<sup>3</sup> In the motion, Debtor stated:

On March 21, 2000, the day before the filing of the Chapter 11 bankruptcy for Larson Concrete Company, Steven G. Larson, loaned to Larson Concrete Company the sum of \$10,000.00 in order to facilitate the filing of the Chapter 11 bankruptcy and to retain Curt R. Ewinger as its attorney, for and on behalf of Larson Concrete Company for purposes of filing and representation by him in Larson Concrete Company's Chapter 11 bankruptcy.

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<sup>3</sup> Steven Larson's administrative expense claim was one of three administrative expense claims and related objections to proofs of claim involving Larson family members associated with the debtor corporation. The others were resolved.

Debtor<sup>4</sup> argued that Steven Larson was entitled to have the \$10,000 repaid to him as an administrative expenses under 11 U.S.C. § 503(b)(1)(A) and § 503(b)(2)(D) because he made a substantial contribution to Debtor's bankruptcy and because the funds were an actual and necessary cost of preserving the bankruptcy estate.

Chapter 7 Trustee William J. Pfeiffer objected to this administrative expense claim. He argued Debtor did not have standing to make the request for Steven Larson, that a loan to Debtor did not automatically become an administrative claim, and there was no corporate authorization regarding the use of these funds. Creditors B & B Concrete and J & D Enterprises<sup>5</sup> joined the Trustee's objection.

While Steven Larson's administrative expense claim was pending, Attorney Ewinger filed an application for fees. Therein, Attorney Ewinger requested compensation for services of \$12,118.75 and reimbursement of expenses of \$1,555.10 between March 16, 2000, and October 23, 2003, and associated sales tax of \$734.31 for a total of \$14,408.16. In the application, Attorney Ewinger stated:

That no compensation has been received for said services from any other person or from any other source except the \$10,000.00 which was paid to your Applicant by Steve Larson for and on behalf of Larson Concrete Company as a retainer upon the filing of the Chapter 11 Bankruptcy.

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<sup>4</sup> It is unclear why Debtor, rather than Steven Larson himself, filed a motion for allowance of Steven Larson's administrative expense claim. Since the claim is being disallowed, the Court, however, will not rule on Trustee Pfeiffer's contention that Debtor did not have standing to file the motion on Steven Larson's behalf.

<sup>5</sup> J & D Enterprises did not actively participate in the resolution of this administrative expense claim. Counsel for B & B Concrete took the laboring oar.

In the prayer for relief in the application, Attorney Ewinger indicated that the retainer had been paid to him by Debtor.

No objections to Attorney Ewinger's fee application were filed. The Order approving the fee application stated that a retainer of \$10,000 would be applied to the fees that had been awarded; a balance of \$4,408.16 was designated an administrative expense.<sup>6</sup>

The parties eventually advised the Court that Steven Larson's administrative expense claim could be resolved by stipulated facts and briefs. In their stipulated facts, the parties advised the Court, in addition to the facts recited above, that Steven Larson was Debtor's president, that the \$10,000 loan by Steven Larson for Debtor's behalf was placed in Attorney Ewinger's trust account on March 24, 2000 (two days after the petition was filed), that Debtor's \$830 filing fee was paid from the trust account, and that Attorney Ewinger was paid the balance in the account pursuant to the order approving his fees.

DISCUSSION. In the administrative expense motion, Debtor and Steven Larson deemed the loan on Debtor's behalf to have been made pre-petition. Consequently, Steven Larson has an unsecured, pre-petition claim against the estate for the loan since an administrative expense claim may arise only from a post-petition transaction with the bankruptcy estate. *Williams v. IMC Mortgage Co. (In re Williams)*, 246 B.R. 591, 594 (B.A.P. 8th Cir. 1999). Steven Larson's pre-petition claim is not transformed into an administrative claim just because the funds

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<sup>6</sup> The order did not state whether the balance of \$4,408.16 was a Chapter 11 administrative expense or a Chapter 7 administrative expense, which may affect the priority of its payment. See 11 U.S.C. § 726(b)(Chapter 7 administrative expenses have priority over Chapter 11 administrative expenses); see also *State Bank of Waubay v. Bisgard*, 80 B.R. 491 (D.S.D. 1987)(retainer that became property of the bankruptcy estate should not have been used to pay the debtors' counsel when an administrative claim of higher priority remained outstanding).

were used post-petition to pay Debtor's bankruptcy attorney.<sup>7</sup>

The matter is not simplified, nor is a different result reached, if the Court considers the loan to have been made post-petition when the funds were actually disbursed. If the loan is considered to have been made early in the Chapter 11 when the \$10,000 was deposited into Attorney Ewinger's trust account, Debtor, as the debtor-in-possession, should have obtained court approval to borrow the money from Steven Larson since a bankruptcy-related loan would have been outside the ordinary course of Debtor's business. 11 U.S.C. § 364(b); *In re Blessing Industries, Inc.*, 263 B.R. 268, 272-73 (Bankr. N.D. Iowa 2001)(unsecured credit transaction that is outside the range of accepted practices of a debtor's particular industry must be approved by the court). If the loan is considered to have been made when the \$10,000 was applied to Attorney Ewinger's approved fees, then Trustee Pfeiffer would have needed to seek court approval to borrow money from Steven Larson to pay this administrative expense. Since neither Debtor, as the Chapter 11 debtor in possession, nor Chapter 7 Trustee Pfeiffer obtained court authority to obtain a post-petition loan from Steven Larson, the transaction is not an approved loan under § 364(b) that is considered an administrative expense under 11 U.S.C. § 503(b)(1). The requirements of § 364(b) cannot be by-passed by either Steven Larson or Debtor now declaring the loan to have been a necessary expense under § 503(b)(1), especially where circumstances warranting a nunc pro tunc credit order have not yet been established. *Blessing Industries*, 263 B.R. at 273-74 (factors to consider before entry of a nunc pro tunc credit order).

An order disallowing the administrative expense claim will

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<sup>7</sup> The retainer given to Attorney Ewinger became property of the bankruptcy estate regardless of the date of deposit. See *In re Brick Hearth Pizza, Inc.*, 302 B.R. 877, 882 and 882 n.7 (Bankr. D. Minn. 2003); *In re Tri-County Water Association*, 91 B.R. 547, 551 (Bankr. D.S.D. 1988)(pre-petition retainers are held in trust for the debtor and this equitable interest constitutes property of the estate).

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be entered. Steven Larson may amend his proof of claim to seek an additional \$10,000 as an unsecured claim. That will, of course, "undo" the agreed unsecured claim order for him entered February 2, 2004, and put his amended proof of claim back on the table and subject to objection.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)